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IN THE
Supreme Court of the United States

JOHN DAVIS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PUBLIC CITIZEN, THE ELECTRONIC FRONTIER FOUNDATION, JUDICIAL WATCH, AND THE NATIONAL SECURITY ARCHIVE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This *amicus* brief addresses the first question presented in the petition for certiorari:

Does the holding in *Buckhannon Board & Home Care, Inc. v. West Virginia Department of Health & Human Resources*, 534 U.S. 598 (2001), that the term "prevailing party" requires a judicially sanctioned change in the relationship of the parties in order to be eligible for an award of attorney's fees and costs in two civil rights statutes extend to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), which provides that a plaintiff who "substantially prevails" is eligible for fees?

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INTERESTS OF THE *AMICI CURIAE*[1]

Public Citizen is a non-profit, consumer-advocacy organization with approximately 100,000 members nationwide. It appears before Congress, administrative agencies, and the courts concerning the enforcement of a wide range of health, safety, environmental, and consumer legislation. Public Citizen's attorneys have either represented or filed *amicus* briefs in a number of cases before this Court on attorney fees, including *Scarborough v. Principi*, 541 U.S. 401 (2004), *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), and *Kay v. Ehrler*, 499 U.S. 432 (1991). In addition, Public Citizen promotes accountability in government by requesting public records and using them to provide the public with information on the activities of the government, and by providing legal assistance to others who seek access to information held by government agencies. Because it regularly litigates cases under the Freedom of Information Act (FOIA), Public Citizen has experienced first-hand how the D.C. Circuit's extension of the holding in *Buckhannon* to FOIA cases leads to a reduction in attorney fees for those seeking to enforce FOIA as private attorneys general.

The Electronic Frontier Foundation (EFF) is a non-profit, public-interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990 and based in San Francisco, California, EFF has more

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[1]The parties' letters of consent to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, counsel states that this brief was not authored in whole or in part by counsel for a party and that no one other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

than 12,000 members and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to websites in the world, http://www.eff.org. In support of its mission, EFF is a frequent user of FOIA and, when necessary to vindicate its statutory rights, pursues litigation under the Act.

Judicial Watch, Inc., is a non-profit, tax-exempt organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch, Inc. seeks to promote accountability, transparency, and integrity in politics, government, and the law. The organization utilizes FOIA, among other means, to obtain and disseminate information about government misconduct. Since its inception more than ten years ago, Judicial Watch, Inc. has served over 430 FOIA requests and filed at least 75 lawsuits seeking to compel compliance with FOIA, in addition to other suits seeking to enforce state open records laws.

The National Security Archive (the "Archive") is an independent non-governmental research institute and library located at The George Washington University. The Archive collects and publishes declassified documents acquired through FOIA. It has published more than 500,000 pages of declassified documents in various formats, all pursuant to FOIA's core purpose of ensuring an informed citizenry. The Archive has participated in many FOIA cases in the federal courts as a party or as an *amicus curiae*. Because the Archive has litigated cases against agencies that fail to process FOIA requests until after litigation has been initiated, but then change their position and release records after summary judgment motions have been prepared and filed, the Archive is familiar with the impact of the D.C. Circuit's application of the *Buckhannon* ruling to FOIA cases on the functioning of FOIA programs.

INTRODUCTION

In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 600 (2001), this Court held that a party that has "achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct" is not a "prevailing party" under the Fair Housing Amendments Act or the Americans with Disabilities Act. Although FOIA does not use the term "prevailing party," the D.C. Circuit held in *Oil, Chemical & Atomic Workers International Union, AFL-CIO v. Department of Energy*, 288 F.3d 452 (D.C. Cir. 2002) ("OCAW"), relied on by the decision below, Pet. App. 23, that *Buckhannon* precludes an award of attorney fees under FOIA where the plaintiff obtains the release of previously withheld records without a judgment on the merits or a court-ordered consent decree.

The D.C. Circuit's rejection of the catalyst theory for fee recovery in FOIA cases severely threatens FOIA's goal of "permit[ting] access to official information long shielded unnecessarily from public view." *EPA v. Mink*, 410 U.S. 73, 80 (1973). Because it is particularly easy for government agencies to render FOIA cases moot by releasing the disputed records, the extension of *Buckhannon* to FOIA removes the incentive for agencies to release records in accordance with the Act prior to being sued. And because attorneys know they may not be compensated for their meritorious efforts, it inhibits FOIA requesters from finding legal representation and enforcing the law. In short, rejection of the catalyst theory significantly undermines FOIA and the public's right of access to government information.

Because the United States District Court for the District of Columbia is the only court in which venue for a FOIA action

is always proper, 5 U.S.C. § 552(a)(4)(B), a disproportionate number of FOIA cases are filed in that court, and courts around the country turn to the D.C. Circuit for guidance when presented with FOIA issues. Accordingly, the D.C. Circuit's construction of FOIA's fee provision has an enormous impact on FOIA litigation nationwide and on agencies' FOIA practices. And the decision below applied *OCAW* particularly broadly, finding it precluded attorney fees even though the plaintiff had received legal rulings that led to the agency's release of records. This Court should grant the petition for certiorari and reverse the decision below, to encourage timely compliance with FOIA, deter obstructive delay, and ensure that FOIA can continue providing the public with its right to learn about the operations and activities of its government.

STATEMENT OF THE CASE

In 1986, John Davis submitted a FOIA request to the FBI for audiotapes recorded during an FBI investigation, portions of which were played at the resulting criminal trial. The district court ordered production of the records, but the D.C. Circuit reversed, holding that Davis had the burden of showing that the tapes were played at trial. *See Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1278 (D.C. Cir. 1992). After Davis produced docket entries and transcripts from the criminal trial, the FBI released 157 of the 163 tapes. Pet. App. 4.

The district court then granted summary judgment for the FBI on the six remaining tapes, but the D.C. Circuit remanded for a determination of whether the five locatable tapes were segregable. *See Davis v. Dep't of Justice*, 1998 WL 545422 (D.C. Cir. July 31, 1998). On remand, the FBI determined it could release an additional tape. Pet. App. 5.

The district court then again granted summary judgment for the FBI, and Davis again appealed. The D.C. Circuit summarily reversed on the ground that the FBI had not sufficiently documented what efforts it took to ascertain whether the speakers on the tape were alive or dead. *See Davis v. Dep't of Justice*, 2001 WL 1488882 (D.C. Cir. Oct. 17, 2001).

After the FBI filed additional affidavits, the district court ordered the FBI to inform the speakers on the tape that the agency would release the tapes unless they objected within thirty days, Pet. App. 26, but, upon a motion for reconsideration, granted summary judgment for the agency. Pet. App. 28. In addition, although Davis had litigated his case repeatedly in the district and circuit courts, and although he had received 158 of the 163 tapes at issue, the district court denied Davis's motion for attorney fees. Pet. App. 27.

Davis appealed, and the Court of Appeals reversed with regard to the motion for summary judgment and remanded for the FBI to evaluate methods for determining whether the speakers on the tape were alive or dead. Pet. App. 25. Citing *Buckhannon,* 532 U.S. 598, and *OCAW,* 288 F.3d 452, however, the Court of Appeals upheld the district court's denial of attorney fees on the ground that "although to date he has received a total of 158 tapes from the government, none were produced as the result of a 'judgment on the merits' or a 'court-ordered consent decree.'" Pet. App. 24 (quoting *OCAW*, 288 F.3d at 457).

REASONS FOR GRANTING THE PETITION

I. The Catalyst Theory Is Critical To The Effective Enforcement Of FOIA.

Congress added FOIA's attorney-fees provision in 1974 based on the recognition that "[t]oo often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information, allowing the government to escape compliance with the law." S. Rep. No. 93-854, 93d Cong., 2d Sess., at 17 (1974). The provision promotes compliance with the statute and enables requesters who are wrongfully denied records to vindicate their rights. Denying complainants the ability to recover attorney fees when their lawsuits serve as a catalyst for the government to release records severely undermines the goals of the attorney-fees provision and, accordingly, endangers the public's ability to enforce the Act and gain access to information withheld from its view.

Unlike many other statutes with fee-shifting provisions, the relief sought in FOIA cases is always injunctive: FOIA plaintiffs always seek an order requiring an agency to produce records. 5 U.S.C. § 552(a)(4)(B). It is therefore particularly easy for government agencies to moot FOIA actions by releasing requested records after lawsuits have been filed. Indeed, *amici* find that agencies often do not hand over records until after they have filed suit. And the government's ability to moot an action lasts well beyond just the filing of the complaint. This case itself demonstrates that, at least according to the decision below, it can happen even after the complainant has litigated his case repeatedly in both the district and circuit courts.

Because agencies can always moot a FOIA action by releasing the records before a judgment on the merits, the D.C. Circuit's holding in *OCAW* reduces agencies' incentives to release records in a timely manner, without the need for judicial intervention. Agencies can withhold records with impunity, until long after they are legally required to release them, knowing that so long as they release the records before a court decision on the merits, they will not have to pay the requesters' attorney fees. As the D.C. Circuit itself recognized thirty years ago, "[i]f the government could avoid liability for fees merely be conceding the cases before final judgment, the impact of the fee provision would be greatly reduced. The government would remain free to assert boilerplate defenses, and private parties who served the public interest by enforcing the Act's mandates would be deprived of compensation for the undertaking." *Nationwide Bldg. Maint., Inc. v. Sampson*, 559 F.2d 704, 710 (D.C. Cir. 1977). Removing the risk that the government will have to pay attorney fees when it moots an action significantly decreases the attorney-fees provision's power to encourage agencies to abide by the law.

Moreover, by precluding FOIA plaintiffs from receiving attorney fees when the agency releases requested records during the course of litigation, the D.C. Circuit's holding reduces the incentives for attorneys to take FOIA cases. As the 1974 Senate Report noted: "Often the average citizen has foregone the legal remedies supplied by the Act because he has had neither the financial nor legal resources to pursue litigation when his Administrative remedies have been exhausted." S. Rep. No. 93-854, at 17-18 (citation omitted); *see also* Comm. on Gov't Operations, *Administration of the FOIA*, H.R. Rep. No. 92-1419, 92d Cong., 2d Sess., at 73 (1972) ("Few individuals can afford the expense of litigating a suit under the Freedom of Information Act, even though the agency's decision to withhold

information may be clearly unlawful."). Because FOIA requesters often cannot afford private attorneys, the attorney-fees provision is vital for them to be able to find counsel to take their cases. If an attorney knows that a government agency can deny her fees in a meritorious lawsuit by mooting the case after significant work has been completed, however, she will be less likely to agree to take the case in the first place, thereby thwarting "congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the Act's mandates." S. Rep. No. 93-854, at 17.

FOIA seeks to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). It is particularly important that FOIA requesters be able to obtain judicial review when agencies withhold records because, unlike with many other statutes with fee-shifting provisions, the government itself does not file actions to enforce FOIA, so effective enforcement of the Act depends on the ability of private citizens to file suit. Precluding FOIA requesters from receiving attorney fees under the catalyst theory, however, inhibits requesters' ability to seek legal representation to challenge wrongful withholdings and reduces agency incentives to comply with the law in the first place. It thereby undermines FOIA and the democratic principles the statute seeks to promote.

II. This Court's Analysis In *Buckhannon* Is Not Applicable To FOIA.

The D.C. Circuit rejected the catalyst theory for FOIA cases based on this Court's decision in *Buckhannon*. Because

of FOIA's language and structure, however, the analysis in *Buckhannon* is inapplicable to FOIA cases.

This Court's decision in *Buckhannon* rested on the meaning of "prevailing party," which was used in the fee-shifting provisions of the two statutes at issue in that case. The Court characterized "prevailing party" as a term of art and looked first to the phrase's definition in the 1999 edition of *Black's Law Dictionary*. *See Buckhannon*, 532 U.S. at 603. That definition referred to a "party in whose favor a judgment is rendered." *Id.* (citing *Black's Law Dictionary* 1145 (7th ed. 1999)). The Court read this definition as a distillation of its case law, *id.*, and concluded that the term permits a fee award only when a party prevails by obtaining a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 605.

FOIA does not contain the term of art, "prevailing party." Instead, FOIA's fee provision permits fee awards to plaintiffs who have "substantially prevailed." 5 U.S.C. § 552(a)(4)(E). The most recent edition of *Black's Law Dictionary* available in 1974, when the attorney-fees provision was added to FOIA, defined "substantially" as "[e]ssentially; without material qualification; in the main; in substance; materially; in a substantial manner. About, actually, competently, and essentially." *Black's Law Dictionary* 1597 (4th ed. 1968). It defined "prevail," in relevant part, as "[t]o be or become effective or effectual." *Id.* at 1352. Thus, in contrast to the definition of "prevailing party" considered in *Buckhannon*, the definitions relevant to interpreting FOIA's fee provision do not even refer to a judgment or litigant. These definitions demand a functional approach, under which a FOIA plaintiff is eligible for fees if he essentially attains the goal of the lawsuit, the requested records, whether or not a court has issued a judgment in the case.

Just as the linguistic analysis in *Buckhannon* does not apply to FOIA's language, *Buckhannon*'s analysis of the ramifications of rejecting the catalyst theory is inapplicable given the nature of the relief requested in FOIA cases. In *Buckhannon*, this Court discounted the plaintiffs' argument that rejecting the catalyst theory would cause defendants to moot actions before judgment to avoid fees, noting that plaintiffs' "fear of mischievous defendants only materializes in claims for equitable relief," and that "[e]ven then, it is not clear how often courts will find a case mooted," because voluntary cessation does not moot a case unless it is "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Buckhannon*, 532 U.S. at 608-09 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). As discussed above, however, the relief requested in FOIA cases is always equitable. And the wrongful behavior cannot reasonably be expected to recur because once an agency has made records public, it cannot take them back. It is therefore particularly easy for FOIA defendants to render actions moot, and the fear of "mischievous defendants" in FOIA cases is far from illusory.

Moreover, the Court's skepticism of the plaintiffs' assertions about the consequences of rejecting the catalyst theory rested on its belief that those assertions were "entirely speculative and unsupported by any empirical evidence." *Buckhannon*, 532 U.S. at 608. Empirical research conducted since *Buckhannon*, however, demonstrates that "strategic capitulation occur[s]" and that it "seems to be a particular problem for organizations that litigate against states, and therefore find themselves limited to only injunctive relief claims." Catherine R. Albiston and Laura Beth Nielson, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L.

Rev. (forthcoming June 2007), at 41, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=937114. Furthermore, qualitative data indicate that "*Buckhannon* both discourages settlement *and* discourages lawyers from representing plaintiffs in enforcement actions." *Id.* at 34 (emphasis in original). Given these findings, it is not "entirely speculative" to conclude that the rejection of the catalyst theory in FOIA cases negatively affects enforcement of the statute.

Finally, the Court in *Buckhannon* expressed concern that accepting the catalyst theory would spawn a "second major litigation," as the parties argued over the motivation for the government's release of records. 532 U.S. at 609-10. However, because FOIA litigation is proceeded by an administrative process, in which the agency considers and sets forth its position in both the initial response and in response to the requester's administrative appeal, causation is often clearer in FOIA cases than in cases brought under other statutes with fee-shifting provisions. Until the D.C. Circuit's decision in *OCAW*, the catalyst theory was regularly applied in FOIA cases, and it did not generally result in the kind of second major litigation with which *Buckhannon* was concerned. And unlike in cases involving the statutes at issue in *Buckhannon*, even when a court has issued a judgment on the merits of a plaintiff's FOIA claim, it considers whether the government had a reasonable basis for withholding records in determining whether a FOIA plaintiff is entitled to fees. *See Chesapeake Bay Found. v. U.S. Dep't of Agric.*, 11 F.3d 211, 216-17 (D.C. Cir. 1993). Thus, the concern expressed by Justice Scalia in his concurrence in *Buckhannon* that the catalyst theory can lead to attorney fees for a plaintiff "with a phony claim" where the defendant settled because of the cost of further litigation, *Buckhannon*, 532 U.S. at 617-18, is inapplicable to FOIA cases.

In short, this Court's reasoning in *Buckhannon* does not apply to FOIA. The Court should grant the petition for certiorari and reverse the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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